

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Implementation of the Satellite Home Viewer)	
Extension and Reauthorization Act of 2004)	MB Docket No. 05-49
)	
Implementation of Section 340 of the)	
Communications Act)	
)	
)	

To: Office of the Secretary
Attention: The Commission

COMMENTS OF SAGA BROADCASTING, LLC

Saga Broadcasting, LLC (“Saga”)¹, hereby files its comments on the *Notice of Proposed Rulemaking* (“NPRM” or “Notice”), FCC 05-24, released February 27, 2005, in which the FCC proposed rules to implement Section 202 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”).² Section 202 of the SHVERA creates Section 340 of the Communications Act of 1934, as amended (“Communications Act” or “Act”), which provides satellite carriers with the authority to offer Commission-determined “significantly viewed” signals of out-of-market (or “distant”) broadcast stations to subscribers.

¹ Saga Broadcasting, LLC, is licensee of KAVU-TV, Victoria, Texas.

² The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), Pub. L. No. 108-447, § 202, 118 Stat 2809, 3393 (2004) (to be codified at 47 U.S.C. § 340). These Comments are timely filed by April 8, 2005.

Background

Section 202 of the SHVERA creates Section 340 of the Communications Act of 1934, as amended (“Communications Act” or “Act”), which provides satellite carriers with the authority to offer Commission-determined “significantly viewed” signals of out-of-market (or “distant”) broadcast stations to subscribers. To place SHVERA in the proper historical context, it is necessary to discuss the Commission’s regulation of cable television in hopes that the Commission will not perpetuate in this proceeding errors made in its regulation of cable television which began, in earnest, with the adoption of the *Cable Television Report and Order*, 36 FCC 2d 143 (1972) (“CATV Order”) and the *Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972) (“Reconsideration Order”). The CATV Order adopted the standard that an out-of-market network affiliate should be considered to be “significantly viewed” if it obtains at least a three percent share of the viewing hours in television homes in the community and has a net weekly circulation of at least 25 percent.³ For purposes of establishing that a station meets the significant viewing standard the Commission used the 1971 American Research Bureau (“ARB”) “Television Circulation Share of Hours” survey information for those counties in which there was less than ten percent cable television penetration. In those counties where there was ten or more percent penetration, the Commission used

³ The CATV Order provided at footnote 43: “As used here the term net weekly circulation is a measure of the number of households that viewed a station for five minutes or more during an entire week, expressed as a percentage of the total television households in the community. Share of viewing hours is a measure of the total hours all television households in the community viewed a station during the week, expressed as a percentage of the total hours these households viewed all stations during the period surveyed.”

the ARB 1971 "Non-CATV Circulation and Share of Viewing Hours Study for ARB CATV-Controlled Counties." The latter was prepared for the Commission by ARB so that in those counties with substantial existing cable penetration, over-the-air viewing in the absence of cable television could be measured. The CATV Order stated:

Because this data is provided on a county-wide basis only, we recognize that it may not account for variations in viewing levels among communities within the county. There may be other drawbacks in using these surveys, such as rounding of percentages and sampling errors. We nevertheless propose to accept this county-wide information to establish viewing levels for signals in all communities within these counties. In doing so, we note that survey information of this type is generally used by the television industry without differentiating among communities within counties, and that it gives a useable indication of viewing. But the most important consideration in our decision to accept these figures as conclusive is the strong **desirability of certainty**, both from a cable and a broadcast point of view. [footnote omitted] **Otherwise, rather than permitting cable to get moving, we believe there would be controversy in virtually every case. By proceeding in this fashion, we hope to reduce controversy, to provide a base of signals that cable systems will be assured they may carry, and to define areas in which stations will have rights to carriage.** This approach strikes an appropriate balance -- in 1966 we selected the Grade B contour, and in 1968 the 35-mile zone, neither of which was specifically geared to actual viewing, while we now select a precise standard that is much more likely to reflect such viewing. [emphasis added.]

The CATV Order adopted as "Appendix B" a "Table of Significantly Viewed Stations." In the Reconsideration Order, the table of significantly viewed stations was slightly modified, but it was codified as Appendix B to Title 47 C. F. R. § 76.54(a), which, although fraught with errors, has become holy writ. In fact, former Commissioner Robert E. Lee, dissented to the Reconsideration Order:

As to the significant viewing test itself, I have previously made clear that this is a "one-sided" approach that violates common sense and the law. Will the Commission really refuse to let a broadcaster submit a survey that conclusively shows that a signal does not meet the 2% or 3% criterion in the community, whatever it does in the county? Why?

The Commission's reasons all boil down to administrative ease. That is no reason to violate common sense and *Storer*.

Now, the Commission apparently intends to adopt that list of stations as the list of significantly viewed stations for satellite viewing purposes (“SV List”), errors and all. As shown *infra*, the Commission should not again violate common sense and compound its error by adopting the SV List without considering evidence to demonstrate that certain stations should not be on the list.

Request to Correct SV List

At NPRM ¶¶ 11-15, the Commission observed that Section 340(c) of the Act directs the Commission to publish and maintain a unified list of significantly viewed stations, and the communities containing such stations, that will apply to both cable operators and satellite carriers. In accordance with the SHVERA, the Commission compiled a list of stations that were granted significantly viewed status pursuant to the Commission’s cable television rules. The SV List which is attached to the NPRM as Appendix B, is a list of significantly viewed stations and the communities containing such stations combining the Commission’s original 1972 list of significantly viewed stations granted on a county-wide basis with stations added on a county or community-wide basis over the intervening years.

At NPRM ¶17, the Commission stated its belief that:

...the SV List appended to this Notice has a high degree of accuracy and, therefore, believe that both cable and satellite carriers may rely on its validity to commence service, consistent with the other requirements set out in the SHVERA and this proceeding, prior to the adoption of a final list. Nevertheless, in light of the length and age of the SV List, we are asking all interested parties to review the SV List to confirm its accuracy.

We seek comment here only about whether the SV List accurately reflects such existing significantly viewed determinations, and not about whether the SV List should be modified because of a change in a station's circumstances subsequent to its placement on the SV List. As discussed below in Section III.A.3, the SHVERA provides for a mechanism for parties to subsequently seek modification of the SV List. Requests to modify the SV List based on changed circumstances must follow this process. [footnote omitted] Parties may file comments in response to this Notice describing the nature and basis of any error, including changes in call sign or community. Such comments must include documentary evidence supporting the requested correction. If we find that a station or community has been listed in error, carriage of such signals in such communities will no longer be permitted pursuant to the significantly viewed provisions pertaining to satellite carriers.

Saga realizes that the Commission has consistently refused to delete stations from the cable television list. In fact, in *KCST-TV, Inc. v. FCC*, 699 F.2d 1185 (D. C. Cir. 1983), the Court of Appeals set aside and remanded to the Commission a case where the Commission had denied a licensee waiver of a Commission rule⁴ that kept an out-of-market television station on the list of significantly viewed stations even though the station was actually no longer significantly viewed. The Court stated that "...under the current rules there is no apparent rationale for not granting a waiver of the non-duplication rules when a party shows that a station is not significantly viewed." The Court added, "...administrative inconvenience does not justify not granting a waiver. [footnote omitted] The Commission permits stations to prove that they are significantly viewed, 47 C. F. R. § 76.54(b)(d) [footnote omitted] which appears to be no less of a burden on the FCC than permitting stations to prove that distant stations are not significantly viewed." Thus, it is clear that the Commission should permit Saga an opportunity to prove that stations on the SV List are not significantly viewed at this stage of the proceedings.

⁴ Title 47 § 76.92(g).

The purpose of these Comments is to bring to the Commission's attention instances of errors in the SV List with respect to stations in the Designated Market Areas ("DMA") where Saga operate television stations. As shown herein, these errors were made initially in 1972 with the adoption of the *Cable Television Report and Order*, 36 FCC 2d 143 (1972), and *Order on Reconsideration* since, in most cases, the stations did not place a Grade B or better signal over the counties.⁵

Victoria, Texas, DMA

Saga requests that the SV List be modified as follows:

SV List Page	State/County	Stations on SV List	How SV List Should Be Revised
403	TX/Victoria	KMOL-TV, 4, San Antonio, TX (formerly WOAI) ⁶ KENS-TV, 5, San Antonio, TX KSAT-TV, 12, San Antonio, TX KIII-TV, 3, Corpus Christi, TX +KAVU-TV, 25, Victoria, TX	+KAVU-TV, 25, Victoria, TX

Exhibit 1 attached is a survey compiled by Nielsen, that demonstrates that the stations Saga is requesting be deleted from the SV List are not significantly viewed in Victoria county and should be deleted from the SV List. The NPRM (at paragraph 20) proposes to use the methodology in Section 76.54 of the Rules to add a signal or

⁵ Appendix B of the *1972 Reconsideration Order*, 36 FCC 2d 326 (1972).

⁶ The call sign for KMOL-TV has been changed back to WOAI.

community to the SVList.⁷ By analogy, the same data would be used to show that a station does not meet the significantly viewed criteria, and Saga believes the Nielsen data complies with the standards set forth in Section 76.54(b). The original list of communities and stations was based on Arbitron ratings, but, to Saga's knowledge, only Nielsen provides this data at this time. No special survey was conducted, but data was already in existence to demonstrate that the stations to be deleted are not significantly viewed. Exhibit 2 attached is an engineering statement showing that, in most cases, the stations Saga is requesting be deleted either do not place a Grade B contour over Victoria

⁷ Sec. 76.54 Significantly viewed signals; method to be followed for special showings.

(a) Signals that are significantly viewed in a county (and thus are deemed to be significantly viewed within all communities within the county) are those that are listed in Appendix A of the memorandum opinion and order on reconsideration of the Cable Television Report and Order (Docket 18397 et al.), FCC 72-530.

(b) Significant viewing in a cable television community for signals not shown as significantly viewed under paragraph (a) or (d) of this section may be demonstrated by an independent professional audience survey of non-cable television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September. If two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing level. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level. If a cable television system serves more than one community, a single survey may be taken, provided that the sample includes non-cable television homes from each community that are proportional to the population.

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period. Furthermore, if a survey is undertaken pursuant to the provisions of Sec. 76.33(a)(2)(i) of the rules, notice shall also be served on the franchising authority. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.

(d) Signals of television broadcast stations not encompassed by the surveys (for the periods May 1970, November 1970 and February/March 1971) used in establishing appendix B of the Memorandum Opinion and Order on Reconsideration of Cable Television Report and Order, FCC 72-530, 36 FCC 2d 326 (1972), may be demonstrated as significantly viewed on a county-wide basis by independent professional audience surveys which cover three separate, consecutive four-week periods and are otherwise comparable to the surveys used in compiling the above-referenced appendix B: Provided, however, That such demonstration shall be based upon audience survey data for the first three years of the subject station's broadcast operations.

County, or place a Grade B contour over only a portion of Victoria County.⁸ Therefore, there is a great likelihood that the stations cannot be received easily over the air in these counties, and that they were included on the cable television Appendix B in error. The Nielsen ratings merely confirm the physical difficulty of over-the-air reception.

In light of the foregoing, Saga respectfully requests that the Commission modify the SV list to delete the erroneously-listed television stations noted above, and modify the SV List as set forth in the farthest-right-hand column above.

Respectfully Submitted,

SAGA BROADCASTING, LLC

By: 

Gary S. Smithwick
Its Attorney

Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, NW - Suite 301
Washington, DC 20016
202-363-4560

April 8, 2005

⁸ As depicted on the Expanded View maps, neither KSAT-TV nor KIII place a Grade B contour over the Victoria, TX, DMA. KENS-TV and WOAI place Grade B contours over a small portion of the DMA.

Exhibit 1



Nielsen
Media Research

LOCAL CUSTOM ANALYSIS

VICTORIA, TX DMA
DIARY ONLY DATA
SIGNIFICANT VIEWING STUDY

NOVEMBER 2004
FEBRUARY 2005
NOVEMBER 2004/FEBRUARY 2005 AVERAGE

ORDER #326352 APRIL 8, 2005

PREPARED FOR
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NIELSEN MEDIA RESEARCH
 VICTORIA COUNTY
 DIARY REPORT
 VICTORIA, TX DMA
 SIGNIFICANT VIEWING STUDY
 MULTIPLE CYCLES AND AVERAGE

	NON-CABLE NO ADS HHS NOV 04 -----			NON-CABLE NO ADS HHS FEB 05 -----			NON-CABLE NO ADS HHS AVG -----		
SUMS OF WGHT(000) INTAB	3 36 *			3 31 *			3 67		
	CUME %	CUME (000)	S H R	CUME %	CUME (000)	S H R	CUME %	CUME (000)	S H R
M-S 07:00A-01:00A									
KAVU	90.11	3	34	85.35	2	40	87.90	3	37
KVCT	73.46	2	36	64.34	2	30	69.25	2	33
KVTX-KUNU COMB.	21.35	1	11	23.27	1	22	22.22	1	16
KWVB	<<	<<	<<	<<	<<	<<	<<	<<	<<
KXTS	30.99	1	10	36.06	1	7	33.31	1	8
KABB	<<	<<	<<	<<	<<	<<	<<	<<	<<
KBEJ	<<	<<	<<	<<	<<	<<	<<	<<	<<
KENS	9.30	<<	4	8.00	<<	3	8.70	<<	4
KLRN	<<	<<	<<	3.73	<<	<<	1.72	<<	<<
KNIC+	<<	<<	<<	<<	<<	<<	<<	<<	<<
KPXL	<<	<<	<<	<<	<<	<<	<<	<<	<<
KRRT	<<	<<	<<	<<	<<	<<	<<	<<	<<
KSAT	14.37	<<	1	9.21	<<	<<	11.97	<<	1
KVDA	<<	<<	<<	<<	<<	<<	<<	<<	<<
KWEX	<<	<<	<<	<<	<<	<<	<<	<<	<<
WOAI	4.88	<<	<<	4.27	<<	<<	4.59	<<	<<
KFTH	<<	<<	<<	<<	<<	<<	<<	<<	<<
KHOU	<<	<<	<<	<<	<<	<<	<<	<<	<<
KHWB	<<	<<	<<	<<	<<	<<	<<	<<	<<
KPRC	<<	<<	<<	<<	<<	<<	<<	<<	<<
KPXB	<<	<<	<<	<<	<<	<<	<<	<<	<<
KRIV	<<	<<	<<	<<	<<	<<	<<	<<	<<
KTBU	<<	<<	<<	<<	<<	<<	<<	<<	<<
KTMD	<<	<<	<<	<<	<<	<<	<<	<<	<<
KTRK	<<	<<	<<	<<	<<	<<	<<	<<	<<
KTXH	<<	<<	<<	<<	<<	<<	<<	<<	<<
KUHT	<<	<<	<<	<<	<<	<<	<<	<<	<<
KXLN	<<	<<	<<	<<	<<	<<	<<	<<	<<
KAJA	<<	<<	<<	<<	<<	<<	<<	<<	<<
KDF	<<	<<	<<	<<	<<	<<	<<	<<	<<
KEDT	<<	<<	<<	<<	<<	<<	<<	<<	<<
KIII	<<	<<	<<	<<	<<	<<	<<	<<	<<
KORO	<<	<<	<<	<<	<<	<<	<<	<<	<<
KRIS	<<	<<	<<	<<	<<	<<	<<	<<	<<
KTOV	<<	<<	<<	<<	<<	<<	<<	<<	<<
KWDB	<<	<<	<<	<<	<<	<<	<<	<<	<<
KZTV	<<	<<	<<	<<	<<	<<	<<	<<	<<

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 MULTIPLE CYCLES AND AVERAGE

	NON-CABLE NO ADS HHS NOV 04 -----			NON-CABLE NO ADS HHS FEB 05 -----			NON-CABLE NO ADS HHS AVG -----		
SUMS OF WGHT(000)	3			3			3		
INTAB	36 *			31 *			67		
	CUME %	CUME (000)	S H R	CUME %	CUME (000)	S H R	CUME %	CUME (000)	S H R
M-S 07:00A-01:00A									
(CONT"D)									
KAKW	<<	<<	<<	<<	<<	<<	<<	<<	<<
KBVO	<<	<<	<<	<<	<<	<<	<<	<<	<<
KEYE	<<	<<	<<	<<	<<	<<	<<	<<	<<
KLRU	<<	<<	<<	<<	<<	<<	<<	<<	<<
KNVA	<<	<<	<<	<<	<<	<<	<<	<<	<<
KTBC	<<	<<	<<	<<	<<	<<	<<	<<	<<
KXAN	<<	<<	<<	<<	<<	<<	<<	<<	<<
HUT	95.56	3		95.83	3		95.68	3	

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VICTORIA, TX DMA
SIGNIFICANT VIEWING STUDY
MULTIPLE CYCLES AND AVERAGE**

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Exhibit 2



ENGINEERING STATEMENT

KAVU-TV

VICTORIA, TX

Saga Broadcasting, LLC licensee of KAVU-TV, a television broadcast station serving Victoria, TX on Ch 25, has requested the preparation of the attached maps. The maps depict the relationship of the Victoria, TX DMA to the Grade B service contours of certain television broadcast stations in markets adjacent to the Victoria, TX DMA.

Specifically, the Grade B contours of the following stations were calculated in accordance with the methodology specified in Part 73 of the Commission's Rules & Regulations and are based on the certified parameters for each station:

WOAI-TV, San Antonio, TX

KSAT-TV, San Antonio, TX

KENS-TV, San Antonio, TX

KIII-TV, Corpus Christi, TX

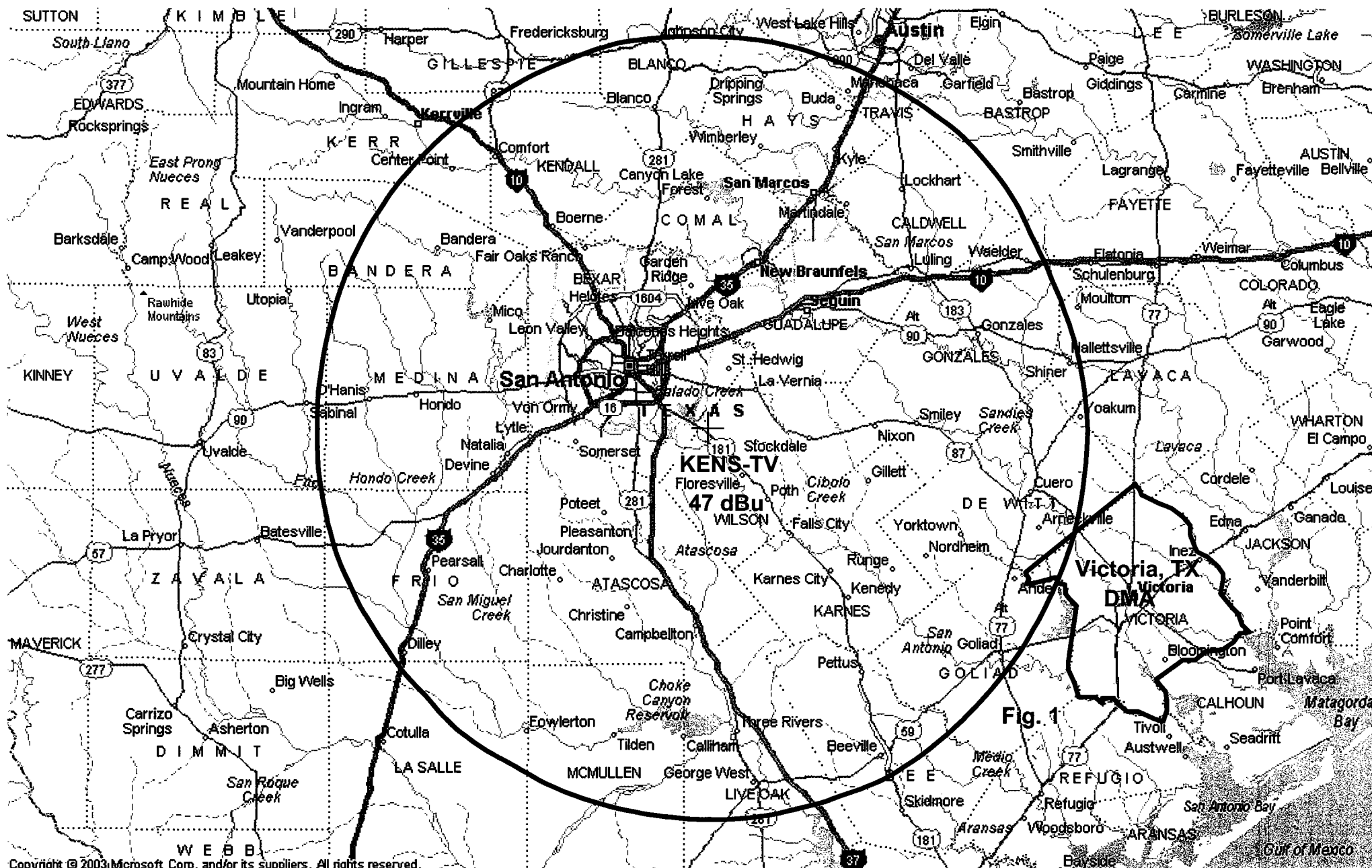
Expanded scale maps are provided for each station in order to more clearly depict the relationship of the contour to counties in the Victoria, TX DMA.

**Certification**

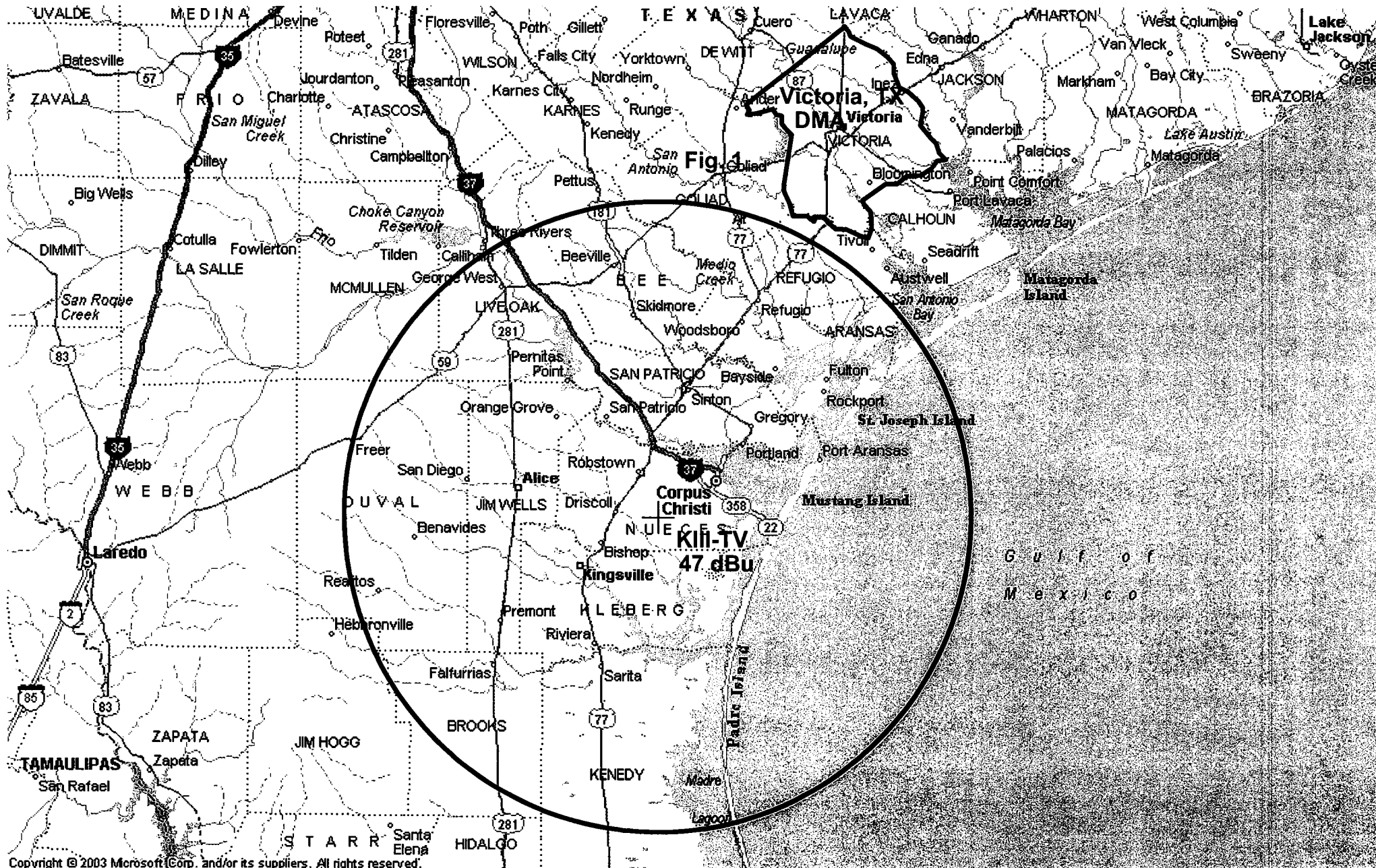
I hereby certify that the foregoing report or statement was prepared by me but may include work performed by others under my supervision or direction. The statements of fact contained therein are believed to be true and correct based on personal knowledge, information and belief unless otherwise stated; with respect to facts not known of my own personal knowledge, I believe them to be true and correct based on their origin from sources known to me to be generally reliable and accurate. I have prepared this document with due care and in accordance with applicable standards of professional practice.

John F.X. Browne, P.E.
April 7, 2005

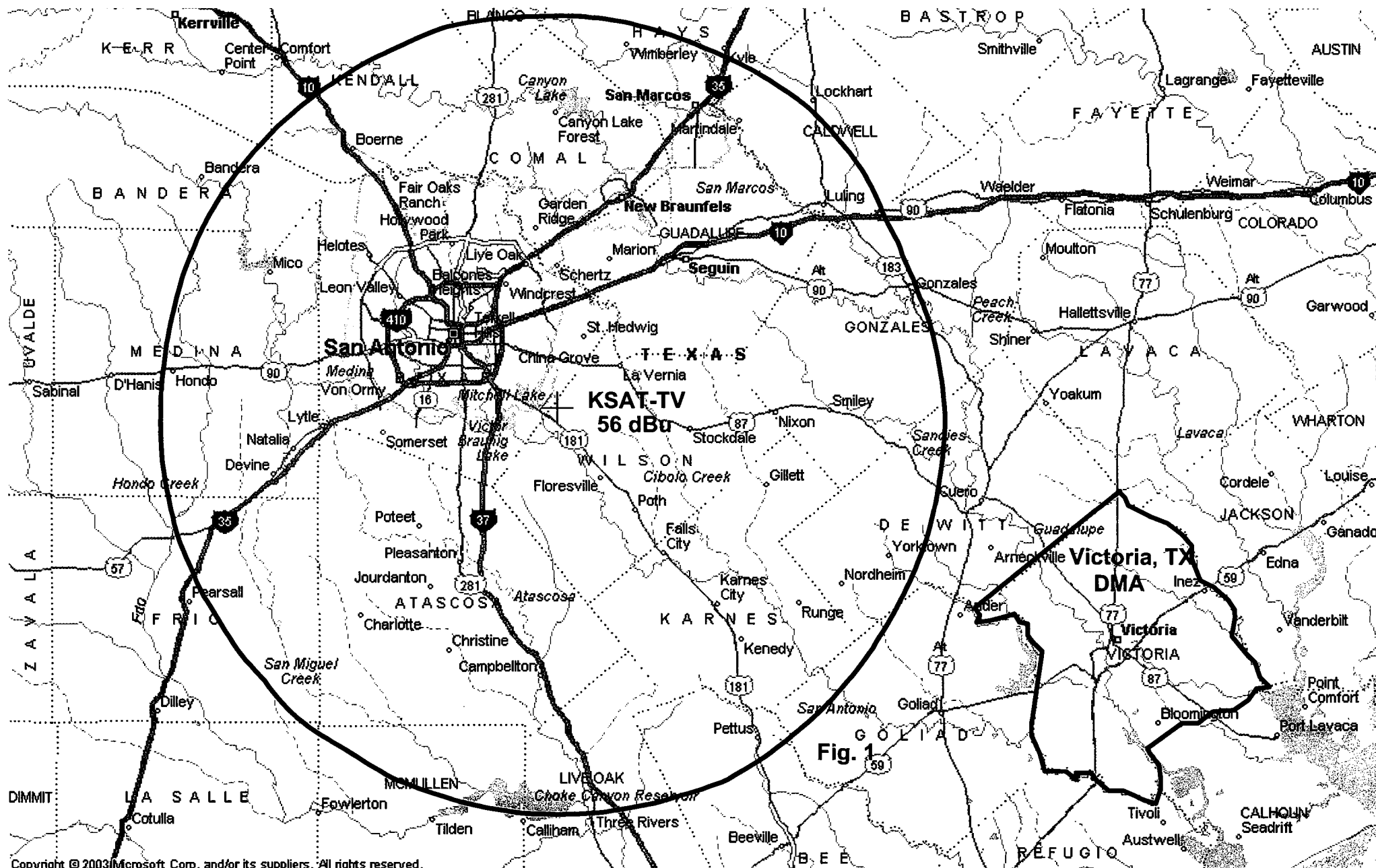
KENS-TV Grade "B" Contour



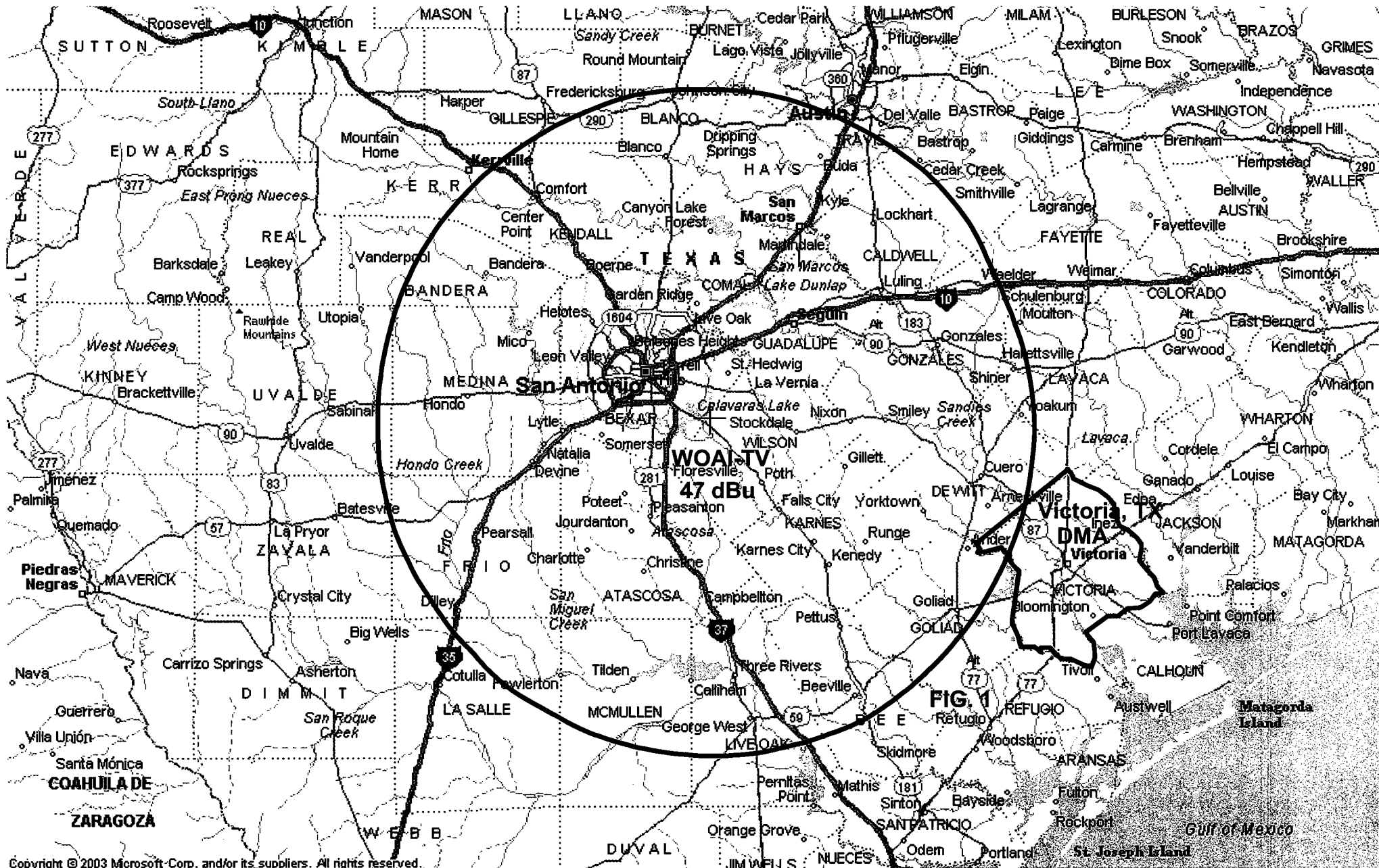
KIII-TV Grade "B" Contour



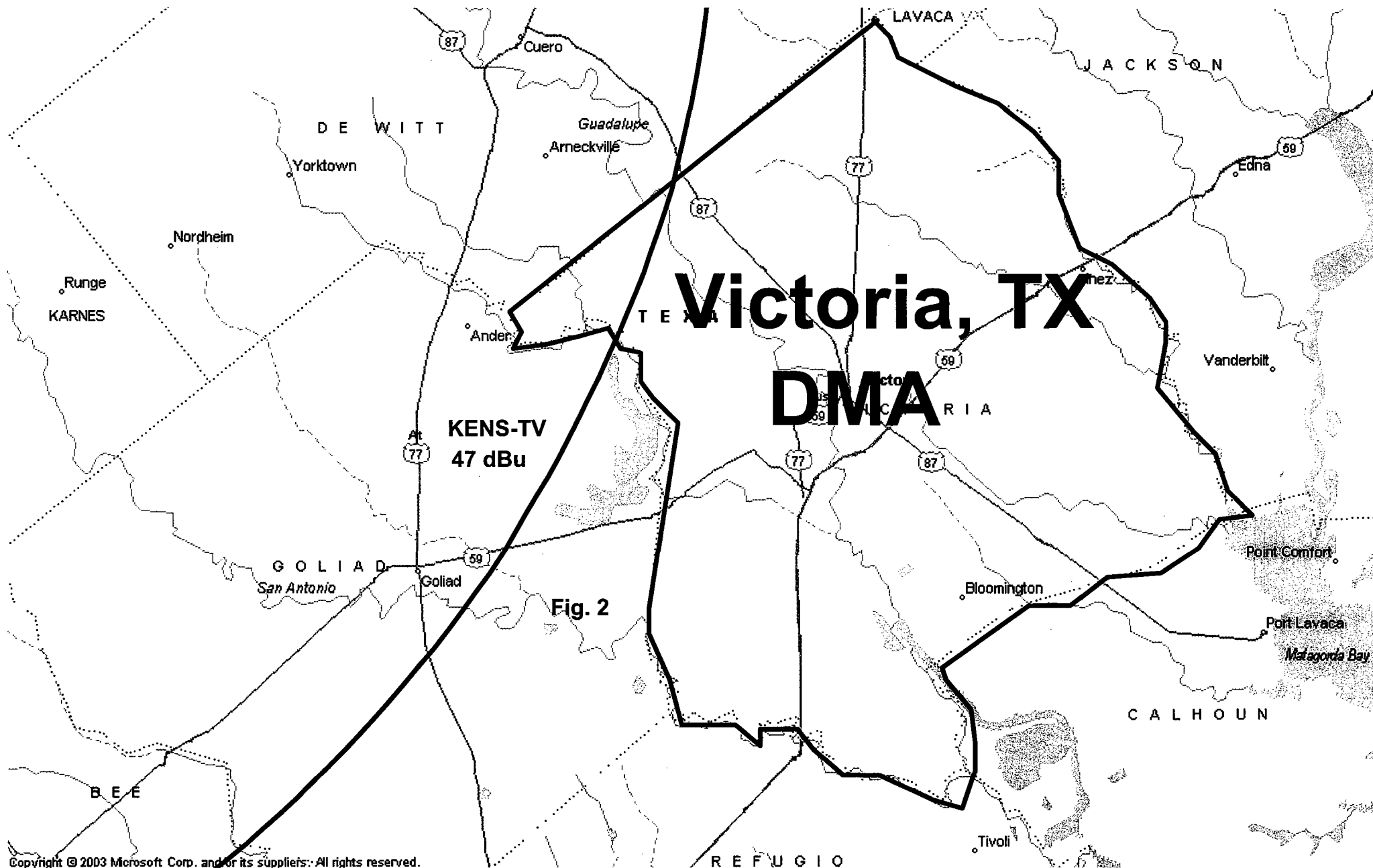
KSAT-TV Grade "B" Contour



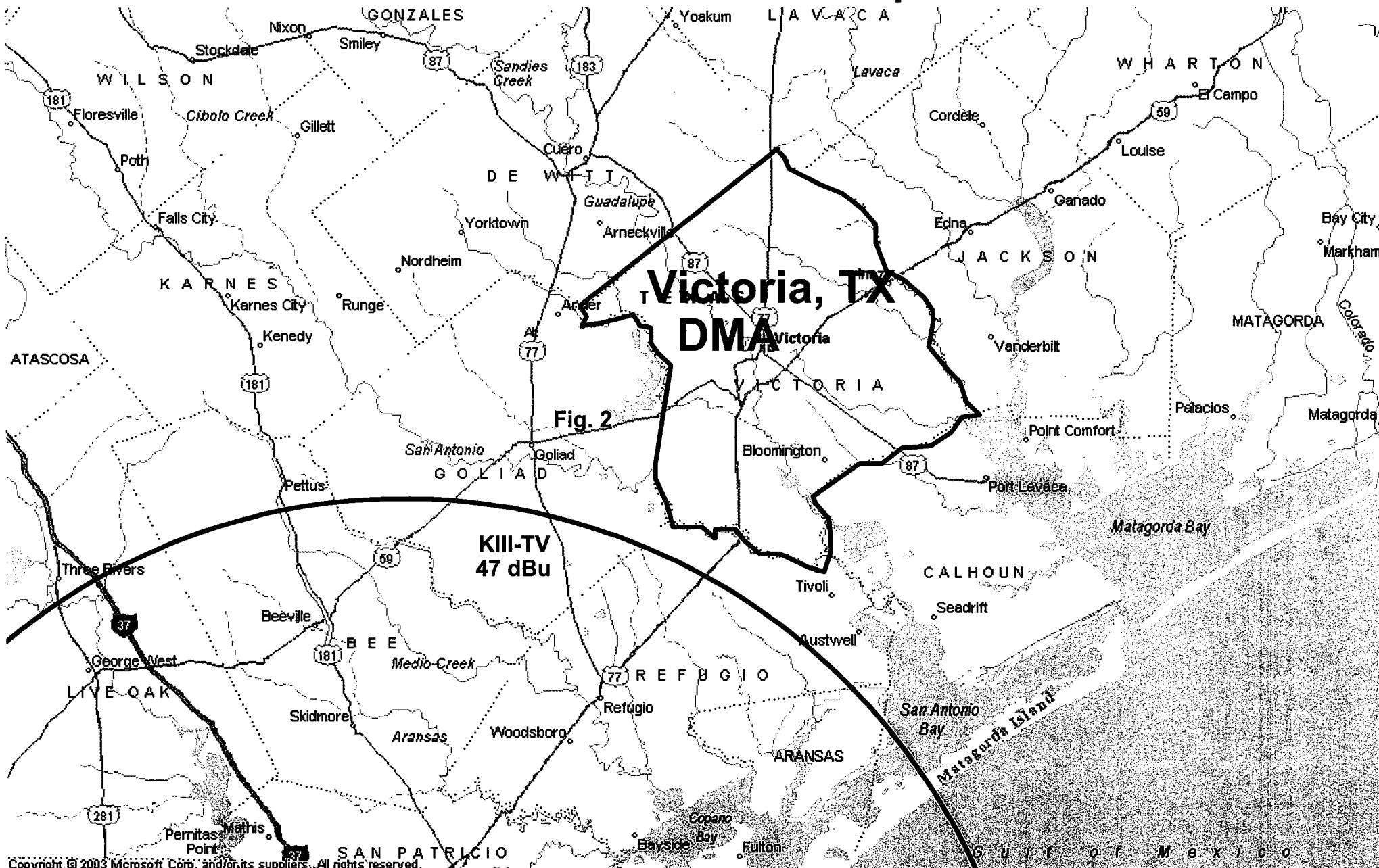
WOAI-TV Grade "B" Contour



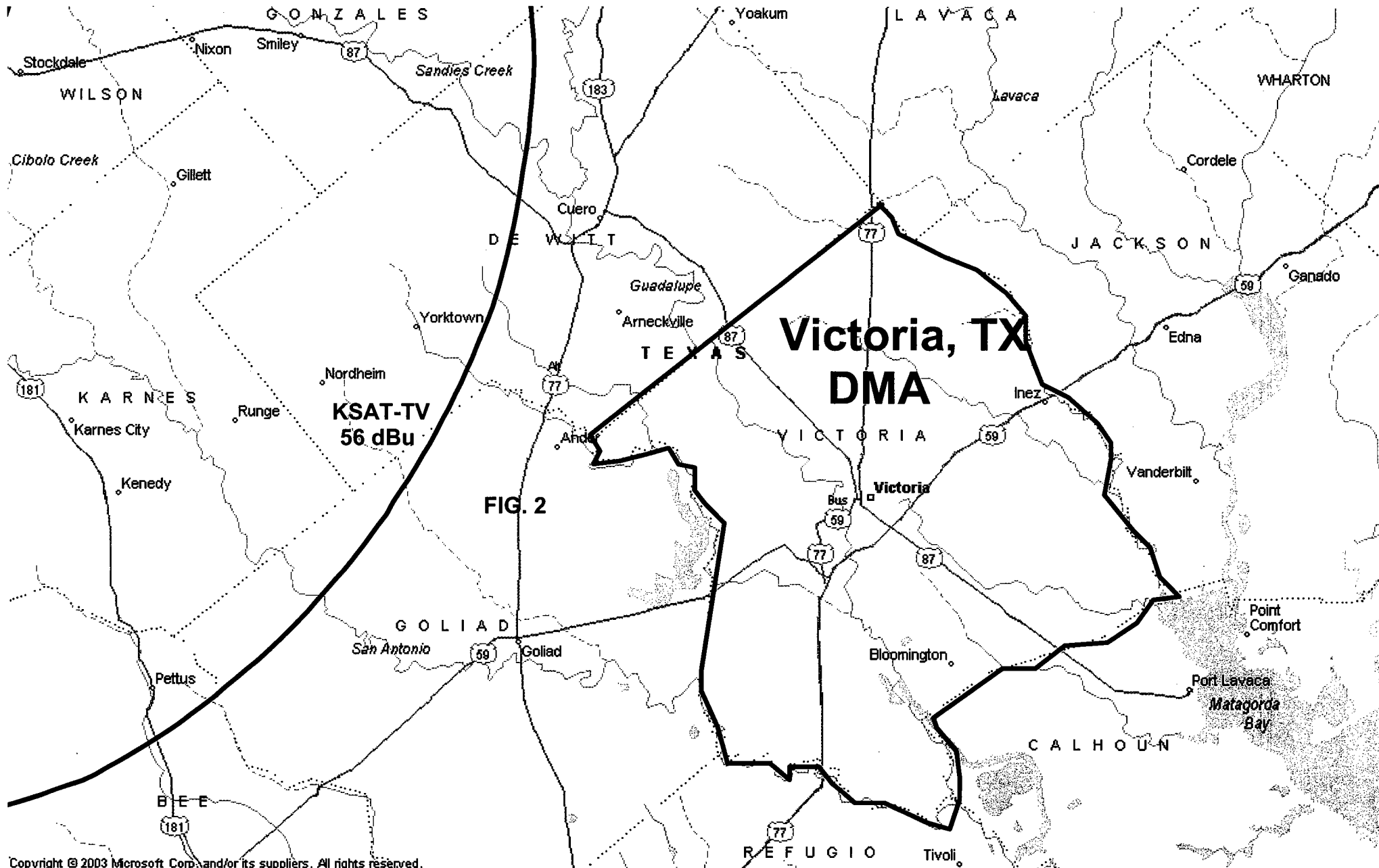
KENS-TV Grade "B" Contour - Expanded View



KIII-TV Grade "B" Contour Expanded View



KSAT-TV Grade "B" Contour Expanded View



WOAI-TV Grade "B" Contour - Expanded View



CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary in the law offices of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing "Comments of Saga Broadcasting, LLC" were mailed by First Class U.S. Mail, postage prepaid, this 8th day of April, 2005, to the following:

Station WOAI
CCB Texas Licenses, L.P.
2625 South Memorial Drive
Suite A
Tulsa, OK 74129-2623

Station KENS-TV
KENS-TV, Inc.
400 South Record Street
Dallas, TX 74202

Station KSAT
Post Newsweek Stations, San Antonio, LP
1408 St. Mary's Street
San Antonio, TX 78215

Station KIII
Channel 3 of Corpus Christi, Inc.
P. O. Box 6669
Corpus Christi, TX 78466



Sherry L. Schunemann